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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 330

AMERICAN BOTTLING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* decision of the court below (R.I. 235) [1] is reported at 205 F. 2d 421. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R.I. 153-172, 173-231) are reported at 99 NLRB 345.

JURISDICTION

The judgment of the court below (R.I. 236) was entered on June 30, 1953. The court below denied

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[1] The volume entitled Transcript of Record, to which has been added the proceedings in the court below, is denoted "R.I."; the volume entitled Petitioner's Appendix, "R.II."; and the volume entitled Respondent's Appendix, "R.III."

petitioner's request for rehearing on August 13, 1953 (R.I. 241). The petition for a writ of certiorari was filed on September 10, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and under Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Petitioner, in the conduct of its business, makes all of its sales locally, but annually receives a substantial quantity of supplies direct from out-of-state. These out-of-state purchases suffice to bring petitioner within the coverage of the Act. In the exercise of its discretionary power to withhold the full measure of its legal jurisdiction, however, the National Labor Relations Board does not generally assert jurisdiction over such a business unless other factors exist. One of these factors is that the business serves as an essential link in a multistate system of manufacture and distribution. The question presented is whether the Board properly applied this standard in deciding that it would effectuate the policies of the Act to assert jurisdiction over petitioner.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Sec. 151, *et seq.*), are set forth in the Appendix to the Petition, pp. 19-20.

STATEMENT

A. The Facts Pertaining To Commerce

Petitioner, a Texas corporation, operates a plant at Corpus Christi, Texas, where it is engaged in the

manufacture, bottling, and distribution of the nationally advertised soft drink, Coca-Cola (R.I. 177; R.II. 2). During the year 1950, petitioner's sales were confined to the State of Texas. However, in the same period, it purchased, for use in its business, supplies valued in excess of $500,000. Approximately $125,000 of these purchases came to petitioner direct from points outside of Texas. (R.I. 177; R.II. 2.) The out-of-state materials received consisted of bottles, cartons and carton handles, coolers, and crowns (R.I. 177; R.II. 3).

Petitioner operates under a contract with the Coca-Cola Bottling Co. 1903 (hereinafter called Bottling 1903), one of six organizations in the United States through which The Coca-Cola Company (hereinafter called the Company) distributes Coca-Cola syrup (R.I. 178, 181; R.II. 9, 118-127).[2] Bottling 1903, in turn, is governed by another contract with the Company itself (R.I. 180; R.II. 129-148).

The contract between Bottling 1903 and the Company gives the former the exclusive right—within the State of Texas and parts of four adjoining States—to bottle Coca-Cola syrup and sell the bottled product. The Company further agrees to furnish a sufficient amount of bottling syrup to meet Bottling 1903's requirements, and licenses it to use the patent design Coca-Cola bottle and the name Coca-Cola. (R.I. 180-181; R.II. 137-140.) In re-

[2] The Company manufactures this syrup at various plants throughout the country. The syrup utilized by petitioner was manufactured at the Company's Dallas, Texas plant, from where, upon order by Bottling 1903, it was shipped direct to petitioner. (R.III. 41-42.)

turn, Bottling 1903 consents that, *inter alia*, it will: (1) bottle Coca-Cola in a prescribed manner; (2) not deal in any substitute product, nor vend Coca-Cola outside of the territory covered by the franchise; (3) buy all Coca-Cola syrup from the Company; (4) use only the distinctive Coca-Cola bottles and crowns; (5) vigorously push the sale of Coca-Cola, and make such additional investments in plant and equipment as may be necessary to meet demand; and (6) permit the Company to inspect its bottling premises (R.I. 181; R.II. 140-143). The contract also fixes the price per gallon to be paid for syrup, which includes 5 cents per gallon for advertising matter (R.II. 144).

Under the terms of this contract, Bottling 1903 is not required to do the actual bottling itself. It is authorized to license other companies within the territory for this purpose, and to sell to them (and to no one else) the syrup obtained from the Company (R.I. 181; R.II. 141-142, 145). "In order to promote the sale of Coca-Cola and enable the actual bottlers to compete with other beverages," the contract establishes the maximum price at which Bottling 1903 may resell the syrup to its licensees (R.II. 145).

The contract between Bottling 1903 and petitioner is one of the sub-licensing arrangements contemplated by the master agreement just described. Thereby, Bottling 1903 bestows upon petitioner, insofar as certain counties in Texas are concerned, its exclusive rights respecting the bottling and sale of bottled Coca-Cola (R.I. 178; R.II. 119-120). Re-

newing the pledges which the Company made to it, Bottling 1903 promises petitioner that it will grant no similar license to anyone else in the same territory, and that it will obtain sufficient syrup to meet petitioner's needs (R.I. 178; R.II. 120-121). In order to enable petitioner promptly to secure an adequate quantity of the distinctive Coca-Cola bottles and crowns and at reasonable prices, Bottling 1903 further promises that it will license a specified number of reputable firms to manufacture these supplies (R.II. 124-125).

In turn, petitioner—as did Bottling 1903 in its contract with the Company—agrees to all of the six conditions respecting the method of bottling Coca-Cola, the restrictions on the sale of substitute products, the purchase of syrup exclusively from Bottling 1903, and the efforts to keep pace with the demand for Coca-Cola (R.I. 178-179; R.II. 121-125) (see *supra*, p. 4).[3] It is further provided that petitioner's failure "to properly and vigorously push the sale of Coca-Cola" shall be grounds for termination of the contract (R. II. 125). Finally, the contract fixes the price at which Bottling 1903 shall supply syrup to petitioner, which price, not only includes a 5 cents per gallon allowance for advertising matter, but is subject to increase "in the same amount . . . as the same may be increased" between Bottling 1903 and the Company (R.I. 179; R. II. 122-123).

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[3] Petitioner ordered Coca-Cola advertising material through Bottling 1903, and representatives thereof made periodic inspections of petitioner's plant (R.I. 179; R. II. 12-13).

B. The Conclusions Of The Board And Of The Court Below

Upon these facts, the Board concluded that petitioner's operations affected commerce within the meaning of Sections 2(6) and (7) of the Act. The Board further concluded that it would effectuate the purposes of the Act to assert jurisdiction over these operations. In this connection, the Board found that, in view of the contract ties between petitioner, Bottling 1903, and the Company, petitioner's operations could be viewed as constituting an essential link in the multi-state operations of the Company for purposes of category three of the Board's "jurisdictional yardsticks."[4] (R.I. 183-185, 224-225.)

The Board held that petitioner had by varied means interfered with its employees' organizational rights in violation of Section 8(a)(1) of the Act, and had, in violation of Section 8(a)(3), discharged or laid off 8 employees because of their union activity (R.I. 154-167, 189-193, 205-213). The Board, accordingly, entered an appropriate

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[4] These yardsticks, which were promulgated by the Board in October 1950, to govern the exercise of its discretionary power to withhold the full measure of its legal jurisdiction, are set forth in *Sixteenth Annual Report of the National Labor Relations Board* (Gov't. Print. Off., 1952), pp. 15 ff. Category three encompasses establishments operating as an integral part of a multistate enterprise. See *The Borden Co.*, 91 NLRB 628; *Seven Up Bottling Co. of Miami, Inc.*, 92 NLRB 1622, 1623.

This Court has expressly indicated its awareness of these standards. See, *e.g.*, *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 685 n. 14; *Bus Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 392 n. 14.

order remedying these unfair labor practices (R.I. 167-172).

The court below filed a one-sentence *per curiam* opinion (R. 235) enforcing the Board's order in full. Petitioner's motion for rehearing on the jurisdictional grounds here asserted was denied without opinion (R.I. 237-241).

ARGUMENT

The petition for a writ of certiorari, which fails to distinguish between the issue of whether the Board has jurisdiction over petitioner as a matter of law, and the different issue of whether the Board's discretionary power in respect to the assertion of this legal jurisdiction was properly exercised (see *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 684), presents no conflict of decisions and no question warranting review by this Court.

1. An impact on commerce sufficient to give the Board legal jurisdiction existed here solely by virtue of the supplies, valued in excess of $125,000, which flowed directly to petitioner from other states.[5] Indeed, petitioner appears to concede that

[5] See, *e.g.*, *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U.S. 318, 325-326; *National Labor Relations Board* v. *Empire Worsted Mills*, 129 F. 2d 668, 669 (C.A. 2); *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. 2d 51, 53 (C.A. 4), certiorari denied, 321 U.S. 795; *J. L. Brandeis & Sons* v. *National Labor Relations Board*, 142 F. 2d 977, 980-981 (C.A. 8), certiorari denied, 323 U.S. 751.

Without merit is petitioner's suggestion (Pet. 9-10, n. 6) that the Board is precluded from relying on these purchases because its decision, although specifically finding that they were made (R.I. 177), did not articulate their legal significance. In the light of the numerous precedents which clearly explain why a

the Board had such legal jurisdiction in its observation (Pet. 16) that Congress would not be "powerless to reach or to regulate even purely interstate business, such as petitioner's, if such regulation were necessary to effectuate a program of regulation of interstate commerce." For, as this Court has often recognized, Congress did decide that this was necessary "in order to protect interstate commerce from adverse effects of labor disputes," and, accordingly, by the Act, it "has undertaken to regulate all conduct having such consequences that constitutionally it can regulate." *Polish National Alliance* v. *National Labor Relations Board,* 322 U.S. 643, 647. See also, *National Labor Relations Board* v. *Fainblatt,* 306 U.S. 601, 606.

The additional facts found by the Board, concerning petitioner's linkage with The Coca-Cola Company's nationwide distribution system, related to the second, and distinct, issue of whether, assuming legal jurisdiction existed, it would effectuate the policies of the Act for the Board, in the exercise of its discretionary power, to assert such

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direct inflow of goods above the *de minimis* level itself gives the Board jurisdiction as a matter of law, "it would be a barren formality to require . . . repetition" of the "same reasons" in every case where such factor exists. *National Labor Relations Board* v. *Regal Knitwear Co.,* 140 F. 2d 746, 747 (C.A. 2), affirmed on another issue, 324 U.S. 9. Cf. *Group of Institutional Investors* v. *Chicago, M., St. P. & P.R.R. Co.,* 318 U.S. 523, 589. In *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U.S. 80, the agency action was vulnerable because—unlike the situation here—the "gap" in the administrative decision could not be filled in by the principles of previously adjudicated cases.

jurisdiction here. As this Court has observed: "Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case." *National Labor Relations Board* v. *Denver Building and Construction Trades Council,* 341 U.S. 675, 684. And, as previously indicated *supra,* p. 6, n. 4, one of the criteria under the Board's administrative standards governing its discretion in asserting jurisdiction is whether the "local" business immediately before it can be regarded as constituting an essential link in a multistate operation.

Since petitioner's relation to other businesses is relevant to the Board's discretion in asserting jurisdiction rather than to its legal power, there is no conflict between the decision below and *National Labor Relations Board* v. *Bill Daniels, Inc., et al.,* 202 F. 2d 579, 586 (C.A. 6), Board's petition for a writ of certiorari pending, No. 81, this Term,[6] and *National Labor Relations Board* v. *Shawnee Milling Co.,* 184 F. 2d 57 (C.A. 10) (Pet. 9-16). In the *Daniels* case, the automobile dealers involved purchased their cars and parts from a Ford Motor Company plant *within the state.* While, as we shall argue in that case, this did not warrant the conclusion that the dealers' activities did not "affect commerce," the point of significance here is that in

[6] The same issue, decided differently by the Ninth Circuit, is involved in *Howell Chevrolet Co.* v. *National Labor Relations Board,* 204 F. 2d 79, certiorari granted, No. 34, this Term.

Daniels the Court of Appeals for the Sixth Circuit thought otherwise. There is nothing in that decision to suggest that, given the crucial fact here of purchases by petitioner directly from outside the state exceeding $125,000, the Sixth Circuit would doubt the Board's jurisdiction. The factor petitioner extracts from *Daniels* is the holding that the dealers there could not be viewed as an "integral part" of Ford's interstate business as a basis for giving the Board *power* over the dealers. Right or wrong, that holding in no way suggests that where, as here, the Board unquestionably has jurisdiction, it may not consider the company's relationship to other businesses in exercising its discretion as to whether to assert that jurisdiction. The same analysis applies to the *Shawnee Milling* case where, again, the Board's legal power, not merely its exercise of discretion, depended on the finding, rejected by the Tenth Circuit, "that a labor disturbance in the plant devoted wholly to intrastate operations would unduly burden the interstate operations at the other plant." *National Labor Relations Board* v. *Tri-State Casualty Insurance Co.*, 188 F. 2d 50, 52 (C.A. 10).

In sum, the cases relied on by petitioner, at best, hold no more than that, for purposes of determining whether legal jurisdiction exists, operations other than those immediately involved may not be considered. Obviously, therefore, these cases do not reach the different question of the weight the Board should give to these other operations in determining whether it would effectuate the policies

of the Act to assert a jurisdiction which otherwise exists. Accordingly, there is no conflict of decisions.

2. The Board's application of its administrative jurisdictional policy in this case presents no substantial question warranting review by this Court. As the court below has emphasized in prior cases, where a challenge to the Board's jurisdiction involves "the wise exercise of, but [not] the existence of, power," this is a matter which Congress has entrusted to the "discretion of the Board." *National Labor Relations Board* v. *Gulf Public Service Co.*, 116 F. 2d 852, 854-855 (C.A. 5); *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 183 F. 2d 451, 453 (C.A. 5). Similarly, the Ninth Circuit, in declining to review the propriety of the Board's exercise of its legal jurisdiction, has stated: "Providing the Board acts within its statutory and constitutional power it is not for the courts to say when that power should be exercised." *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 383, certiorari denied, 341 U.S. 909. Reflecting the same view, the Second Circuit has concluded: "We should hesitate to say that we could have power ever to review" the Board's conclusion as to whether the situation was important enough for the exercise of jurisdiction; "but . . ., if there may be such situations, they must be frivolous beyond rational question. . . ." *International Brotherhood of Electrical Workers* v. *Na-*

tional Labor Relations Board, 181 F. 2d 34, 36 (Learned Hand, C.J.), affirmed, 341 U.S. 694. In view of these principles—and of the fact that, on the basis of the evidence (*supra,* pp. 3-5), there was, indeed, ample basis for the Board's conclusion that petitioner satisfied the "essential link" test of its jurisdictional yardstick—the court below properly accepted the Board's policy determination.

CONCLUSION

The decision below is not in conflict with the decisions of other courts, and it presents no substantial question warranting review. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AMERICAN BOTTLING COMPANY, PETITIONER

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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